No. 92-1478

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROY L. WONDER, *et al.*,

Petitioners,

v.

LANRIC HYLAND,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does the First Amendment permit a City to fire a full time employee who is temporarily in a non-pay status, and thereafter deprive him of his private employment and otherwise retaliate against him, because of his speech on a matter of public concern?

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STATEMENT OF THE CASE

1. *Facts.* After his conviction of a felony in 1964 and subsequent release from prison, respondent Lanric Hyland became an expert in the administration of criminal justice (Pet.App. 3). In May 1987 Hyland began work under petitioner Dennis Sweeney, the Chief Probation Officer of the San Francisco Juvenile Probation Department (JPD). Hyland promised to work full time and petitioners promised to make their best efforts to obtain compensation for him. The agreement was to last until Hyland could obtain a pardon from the Governor of California and thus be appointed to a permanent position in the JPD (Pet.App. 3-

4; E.R 9).[1]

Hyland was issued a department identification card designating him "Special Assistant to the Chief Probation Officer". He had a desk, a phone, and a set of keys. For work performed between October and December 1987 petitioners paid Hyland $10,500.00 from the Youth Guidance Center Improvement Committee, a non-profit corporation controlled by the Juvenile Court. For work performed from January to June 1988 Hyland was paid $9,400.19 by the City and County of San Francisco as a non-civil service employee (E.R. 9-10).

Through February 1989 petitioners considered Hyland an exemplary employee (E.R. 8). Three judges of the Superior Court wrote the Governor recommending a pardon and noting petitioner's contributions to the criminal justice system (E.R. 57-58). Sweeney and his subordinate, petitioner Dennis LaPlante who was the Director of Juvenile Hall, wrote similar recommendations, and commended Hyland's work for the JPD (E.R. 59-60). The Board of Prison Terms and the California Supreme Court unanimously recommended a pardon, and the pardon application was under consideration by the Governor (E.R. 79, 73).

In February 1989, following threatened legal action against the City of San Francisco by the United States Department of Justice and other entities over conditions at

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[1] "E.R." refers to the Excerpts of Record filed in the Court of Appeals.

Juvenile Hall, and findings by the California Youth Authority that Juvenile Hall failed to meet minimal standards required by state law (E.R. 50, 10-11), Hyland drafted an eight page memorandum to three Superior Court judges addressing various shortcomings at Juvenile Hall and attributing them to LaPlante's deficient performance. The memorandum did not discuss any of Hyland's personal employment interests or status (E.R. 49-56). Immediately upon receipt of the memorandum addressed to the judges, Sweeney terminated Hyland because he had "no right to do this" (Pet.App. 4-5).

In March 1989 Sweeney called a newspaper reporter to retaliate against Hyland and disclosed his prior felony conviction (E.R. 14). Sweeney called the office of the Governor and demanded that Hyland not be granted a pardon. He alleged both to the Governor's office and later on television that Hyland had unethically released to the public confidential juvenile court information, an allegation Sweeney knew to be false (E.R. 15, 16, 21). The pardon application was denied (E.R. 79, 73).

After his dismissal Hyland obtained paid employment with the National Center on Institutions and Alternatives ("NCIA"), a private entity (E.R. 7-8, 27). His job was to interview juvenile detainees and write private presenting reports (E.R. 18). Because of his February 1989 memorandum petitioners denied Hyland access to Juvenile Hall, and as a result the NCIA terminated Hyland's work on cases in the San Francisco Juvenile Court (Pet.App. 5, E.R. 27, 19-20).

2. *Proceedings Below.* The District Court, which had jurisdiction under 28 U.S.C. §§ 1343 and 1331, dismissed Hyland's First and Fourteen Amendment claims for failure to state a claim upon which relief could be granted (Pet.App. 35). On the free speech claim the District Court concluded that Hyland's memorandum did not address a matter of public concern as defined in *Connick v. Myers,* 461 U.S. 138 (1983) (Pet.App. 43-44, 47).

The Court of Appeals reversed the dismissal of the First Amendment claim. It held that the deprivation of Hyland's high-level volunteer employment position was a sanction sufficiently serious to trigger First Amendment scrutiny (Pet.App. 8-13). Following the analytic path outlined in *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968) and *Connick*, the Court of Appeals further held that Hyland's memorandum addressed a matter of public concern (Pet.App. 13-20). It remanded for disposition of petitioners' argument that Hyland's speech so severely disrupted office harmony and working relationships that the government's interest in promoting an effective workplace outweighed Hyland's First Amendment rights. The Court of Appeals noted that the application of this balancing test requires a factual inquiry into such matters as whether the speech impairs discipline or obstructs office operations, and concluded that this issue could not be resolved on a motion to dismiss (Pet.App. 20-22). It affirmed the dismissal of the Due Process claims (Pet.App. 22-30).

Petitioners' petition for rehearing by the panel was denied, and their suggestion to the full Court for rehearing in banc was rejected without a dissenting vote (Pet.App. 51).

REASONS FOR DENYING THE WRIT

The petition misapprehends the nature of the decision below and therefore the issues presented. The Court of Appeals' ruling that Hyland could bring a First Amendment claim in the circumstances of this case breaks no new ground, and is supported by decisions of this Court. While whether the government can dismiss for free speech a sometimes-paid volunteer who is temporarily in a non pay status is scarcely a question of general importance or frequent recurrence, this case does not even squarely present that question. Petitioners not only dismissed Hyland from his volunteer position but also caused him to lose his later obtained private employment and otherwise retaliated against him. There are no conflicts between the interlocutory decision below and those of other Circuits, and no other issues presented worthy of further review.

I. THE COURT OF APPEALS' FIRST AMENDMENT RULING IS SUPPORTED BY SETTLED PRINCIPLES AND RAISES NO ISSUES WARRANTING REVIEW.

A. The record shows that the legal issue which petitioners attempt to pose (Pet.App. 4) -- whether the First Amendment prohibits the government from depriving a person of the subjective benefits of serving as a volunteer in retaliation for free speech -- is not squarely presented here. Hyland did not agree to work for free. Petitioners promised Hyland they would use their best efforts to obtain funds, and in fact he was paid $19,900.19 during his twenty one months of employment (E.R. 9-10). Although Hyland had

not received pay since June 1988, petitioners were in the process of obtaining another grant to pay him when he was terminated (Pet.App. 40-41). After the discharge, petitioners engaged in a campaign of retaliation against Hyland, and later deprived him of his subsequently obtained private, paying employment with the NCIA.

Petitioners did more than merely deprive Hyland of the opportunity to perform meaningful work without compensation. Petitioners caused Hyland to suffer a tangible economic loss when they dismissed him from his government position, and an equally tangible economic loss when they caused him to lose his later job in the private sector. Either of these losses by itself, let alone both together, is comparable to that sustained by a probationary employee, who unquestionably can sue under the First Amendment if fired for speech.

B. The Court has held unequivocally that a terminated probationary employee with no property interest in continued employment can maintain a First Amendment claim. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 283-284 (1977). *Accord, Rankin v. McPherson*, 483 U.S. 378, 383-384 (1987). There is no legitimate distinction between the position of Hyland, who was promised that his volunteer position would last until he received a pardon, and that of a non-tenured teacher or probationary employee.

The Court has gone further. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75-79, 110 S.Ct. 2729, 2737-2739 (1990) holds that a First Amendment claim will lie for the failure to promote, transfer, or recall after layoff existing

employees, and even the denial of a job application by a non-employee. See *Elrod v. Burns*, 427 U.S. 347, 359-360 n.13 (1976) (rights are unconstitutionally infringed "both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason"); *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (government may not "deny a benefit to a person because of his constitutionally protected speech"); and *Shelton v. Tucker*, 364 U.S. 479, 488-490 (1960) (government may not alter the employment status of a public employee for exercising first amendment guarantees). It is therefore not apparent how the decision below could be seriously disputable, even if Hyland's only injury had been that caused by the loss of a meaningful but unpaid volunteer position.

C. Whether Hyland is deemed a private citizen or a public employee, the decision below is correct. Private citizens enjoy the broadest possible scope of First Amendment protections. Their insulting, and even outrageous, speech is protected. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). First amendment protections are at their zenith when private citizens attack the government. *E.g., Carey v. Brown*, 447 U.S. 455, 467 (1980). Where government employees are involved, *Connick, supra*, 461 U.S. 138, and related cases recognize the need to balance the interests of the government as employer against the interests of the employee in free speech. Public employees can be fired for speech on matters of private concern, *id.* at 146-147; and employees who speak even on matters of public concern can be disciplined if the speech seriously disrupts the employer-employee relationship, *id.* at 150-151.

Contrary to petitioners' argument, the Court of Appeals did not extend newly created First Amendment rights to government employees who serve as volunteers. Instead it applied to Hyland the holdings of *Connick*, under which a public employee must overcome higher hurdles than a private person. *See Havekost v. United States Department of the Navy,* 925 F.2d 316, 318-320 (9th Cir. 1991) (non-employee licensee's claim not actionable because speech on issues of private concern). There are no cases which require a volunteer to meet yet a higher standard.

Hyland was either a private citizen entitled to the broadest possible free speech rights, or a public employee (or the functional equivalent) whose free speech interests are balanced against the government's interest in an efficient workplace. He cannot be both, and petitioners cannot have this issue both ways. If Hyland's employment status was sufficiently important that his First Amendment claim could be defeated by a showing that his speech seriously disrupted the employer-employee relationship, as petitioners insist (Pet.App. 22), then the termination of that employment status is a sanction sufficiently non-trivial to give rise to a First Amendment claim.

The Court of Appeals' ruling on this issue, to the extent adverse to petitioners, was correct. Further, whether or not petitioners' actions are sufficient to support a First Amendment claim under the highly unusual facts present here does not raise a question of general importance warranting certiorari, especially at this interlocutory stage.

II. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS FROM OTHER CIRCUITS AND IS OTHERWISE UNWORTHY OF REVIEW.

A. Contrary to petitioners' imprecise assertion (Pet. 16; *see id.*, at 14) the Court of Appeals did not hold that independent contractors and licensees may bring actions for retaliation based on speech or affiliation. Equally unsound is petitioners' newly discovered argument -- which the Court of Appeals did not address because it was not made to the panel -- that the result below conflicts with cases such as *Downtown Auto Parks, Inc. v. City of Milwaukee,* 938 F.2d 705 (7th Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 640 (1991), and *LaFalce v. Houston,* 712 F.2d 292 (7th Cir. 1983), *cert. denied,* 464 U.S. 1044 (1984).

Those cases involved independent contractors engaged in political patronage and lobbying activities. The Seventh Circuit distinguished them from cases like this one, involving employees sanctioned for free speech. While recognizing that government employees are protected from retaliation for party affiliation, *LaFalce, supra,* 712 F.2d at 293, and *Downtown Auto Parks, supra,* 938 F.2d 708-709, reasoned that independent contractors were sufficiently different to justify a different result. *Downtown Auto Parks, supra,* at 710, also seemed to distinguish between party affiliation and lobbying activities on the one hand, and free speech on the other. *See also, Rutan v. Republican Party of Illinois,* 868 F.2d 943, 954 n.4 (7th Cir. 1989) *(in banc), reversed on other grounds,* 497 U.S. 62 (1990) (First Amendment already prohibits "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising

her free speech rights"). Assuming *Downtown Auto Parks* and its predecessors can be reconciled with the Court's decision in *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 75-79 (1990), which is not certain, those decisions turn on issues not presented here, and therefore are of no assistance to petitioners.

The only free speech cases petitioners cite or of which we are aware involving dismissed volunteers imply or assume that their loss is actionable. *See Janusaitis v. Middlebury Volunteer Fire Dep't.,* 607 F.2d 17 (2nd Cir. 1979), which implicitly concluded that the loss of a volunteer position supports a free speech claim, and *Versarge v. Township of Clinton New Jersey,* 984 F.2d 1359, 1364 (3rd Cir. 1993), which assumed without deciding that it would. There is therefore no conflict among the Circuits.

B. The Court of Appeals did not hold that the ultimate balance required by *Pickering* and *Connick* is a question of fact instead of law. *See* Pet.App.7; *compare* Pet. 22. It ruled instead that petitioners' argument that Hyland's memorandum so severely disrupted office harmony and working relationships as to outweigh his free speech rights entailed an inquiry into factual matters which could not be resolved on petitioners' motion to dismiss on the pleadings (Pet.App. 7,22). There is no conflict between this interlocutory ruling and those decisions cited by petitioners (Pet. at 23), which address the deference due by appellate courts to factual findings in District Court made after a trial, or rulings at the summary judgment stage.

C. After arguing at length that Hyland's volunteer position was trivial enough that its deprivation does not warrant First Amendment scrutiny, petitioners abruptly shift

fields and assert (Pet. 23-24) that Hyland's position was so important as to fall "into that narrow band of fragile relationships requiring for job security loyalty at the expense of unfettered speech." *Hall v. Ford,* 856 F.2d 255, 264 (D.C.Cir. 1988), quoting *Gonzalez v. Benavides,* 712 F.2d 142, 150 (5th Cir. 1983). It is not surprising that the Court of Appeals failed to address this far-fetched argument, since petitioners did not make it to the panel. This case hardly presents the question whether Hyland's position was of sufficient policy making importance to permit his discharge, consistent with the First Amendment, for non-disruptive free speech on matters of public concern.

CONCLUSION

Certiorari should be denied.

Respectfully Submitted,

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